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Charles H. Orison v. Herman Herbrig et al : Brief of Appellant

Utah Supreme Court

George C. Heinrich; Attorney for Defendants and Appellants;

In the Supreme Court of the State of Utah

CHARLES H. ORISON, sometimes known as CHAS. H. ORISON,

Plaintiff.

vs.

HERMAN HERBRIG, a single man; William Charles Herbrig and wife, Mary R. Herbrig; Ila R. Wichstrom; Frederick Herbrig, a single man; and Leola Forsberg. heirs-at-law of Millie M. Herbrig, deceased; and all other persons unknown claiming any right, title or interest in or lien upon the real property described in the pleadings adverse to the complainant's ownership or clouding his title thereto.

Defendants.

CASE NO.
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APPELLANT'S BRIEF

Appeal from the District Court of the First Judicial District of the State of Utah, in and for the County of Cache.

Honorable Lewis Jones, District Judge

GEORGE C. HEINRICH
Attorney for Defendants and Appellants.

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Authorities Cited

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PRELIMINARY STATEMENT

This is an appeal from a decree in plaintiff's favor rendered by Lewis Jones, Judge of the District Court of Cache County, Utah, in a suit quiet title action brought by the plaintiff, Charles H. Orison, vs. Herman Herbrig, his brother-in-law, his nephews and nieces, children of his deceased sister, Millie M. Herbrig, and

all other persons unknown claiming any interest in the described premises as defendants. Plaintiff based his action on color of title and adverse possession. In defense, Herman Herbrig plead an oral agreement was entered into between him and plaintiff at the time plaintiff went to California to attend his mother's funeral whereby Herbrig agreed to pay plaintiff's mother's funeral expenses and expenses of last illness and in return therefor plaintiff agreed to collect the rents, pay outstanding obligations against the property in the form of delinquent taxes and mortgage indebtedness and otherwise do what was necessary to protect and preserve the Logan City property until such time as it was again wanted by Herbrig or the other heirs of Millie M. Herbrig, deceased, and to keep the rent overplus for his services in so doing. That in keeping with said agreement Herbrig paid the said funeral and other expenses as agreed upon, and that in partial performance of his said agreement plaintiff paid the mortgage indebtedness and some of the delinquent taxes as agreed upon, but that contrary to the terms of said agreement and without the knowledge of Herman Herbrig and the other of the heirs residing in California, the plaintiff bought the property for the 1932 delinquent taxes and received a quit claim deed from Cache County, Utah, to him as grantee. It is upon this deed that plaintiff bases "color or title". He does not claim he ever notified Herman Herbrig or any of the other heirs residing in California that he took title to the property in his name. In 1942 he told Leola Fors-

berg, but she told none of other heirs. Nor in support of his claim of adverse possession does plaintiff claim he ever thereof notified any of the defendants residing in California.

Appellant contends the findings of the lower court upon careful scrutiny are not supported by the evidence, that the preponderance of the evidence, both oral and documentary, and the record, and justice and equity demands a finding in appellants' favor recognizing the agreement so entered into and holding that plaintiff holds title to said property as trustee for the heirs-at-law of Millie M. Herbrig, deceased. This is an equity case and was tried without a jury. The parties will be referred to as appellant and respondent.

STATEMENT OF FACTS

As indicated above, the parties are all related. The property involved in this action was at one time the "homestead" or home of plaintiff and his deceased sister, Millie M. Herbrig, and Letha McNeil, another sister. After the death of the father, ownership passed to the mother, Annie E. Orison, who on June 9, 1917, conveyed to her daughter, Millie M. Herbrig, now deceased, for the sum of $1,400.00. (See pls. Ex. A, sheets 13-14). Shortly before acquiring this property in 1916, at Logan, Utah, Herman Herbrig and Millie M. Herbrig (formerly a widow by the name of Millie Castile with a family) were married. (Def's. Ex. 1 ,pages 1-2). Before Xmas 1922, Herman Herbrig moved to California

and in April following (1923) the children and mother (plaintiff's mother) also went to California. After they left for California the property now in dispute was rented to various persons. A sister, Letha McNeil who lived in Logan collected the rents and sent them to Millie M. Herbrig during her lifetime. Tenants by the name of Jufers lived in the premises from June, 1927, to 1948, a period of twenty-one years. (Tr. 63, 68, 122). Then plaintiff's son moved in. (Tr. 68)

Millie M. Herbrig died at Huntington Park, California, March 9, 1935. The mother, Annie E. Orison, died June 16, 1936, in California, a little over a year later. During the interval between the time of the date of death of Millie and her mother, rents were paid to Herman Herbrig, (Tr. 81, 89, 112, Defs. Ex. 1, pages 2, 9), and they were paid to him direct by the tenant, Jufer, because at the request of the Herbrigs, Letha McNeil, who had been collecting the rents, was in California assisting in the care of her ailing mother. (Tr. 78). Plaintiff went to his mother's funeral in California. While there Herbrig related his financial difficulties because of the recent illness and burial of his wife, Millie, and the expenses in connection with the illness of Mrs. Orison, his mother-in-law. A conversation was then had between plaintiff and Herbrig at which plaintiff agreed to look after the Logan property, collecting the rents, paying therefrom the taxes, mortgage indebtedness, and to keep the residue for his efforts and serv-

ices, and thus hold the property intact for the defendants, and in return therefore Herman agreed to and did pay plaintiff's mother's funeral expenses and expenses of last illness. (Defs. Ex. 4 and 5 and 1 at pages 3, 5, 8, 9.) The substance of this agreement was told by Herbrig to all of the children, except Leola Forsberg, who did not reside in California, and Ila Wickstrom overheard part of the discussion between Herbrig and plaintiff, that part relating to payment of funeral expenses. After this conversation Herbrig assumed plaintiff was carrying out the agreement had with him for the care of the Logan property because he never thereafter received any more rent money, tax notices, nor did he hear from the mortgagee, Erickson, (Tr. 81,83,84,85,89, Defs. Ex. 1 page 9)

Herman Herbrig next heard from plaintiff when this action was filed. (Defs. Ex. 1 page 7). But just prior to filing this action, plaintiff wrote his niece, Ila Wickstrom for the names and addresses of those of her brothers and sisters he was unable to get from Leola Forsberg, whom he had contacted in Logan, stating that he wanted these for genealogy purposes, and in reply she wrote letter dated Nov. 10, 1950, (Def's. Ex. 6). Upon receiving this information he started suit. (Tr. 53-54, 93-95). In 1942 plaintiff told Leola Forsberg, who had then again moved to Logan, that he had purchased the property for taxes in 1937. She figured she had no rights in the property during the lifetime

of her father, so said nothing to anyone. (Tr. 93-94). No correspondence (other than defs. Ex. 6) passed between plaintiff and any of the defendants, and there were no oral conversations between any of them other than that reported with Leola from the time plaintiff left California after attending his mother's funeral until just before the commencement of this action. Herman Herbrig cannot write and has not been known to write. (Tr. 76, 84-85). His daughter, Ila Wickstrom, did all his writing for him. From 1936 to the time suit was filed, Herman Herbrig, had confidence in his brother-in-law, plaintiff, and assumed he was caring for the property as agreed. The agreement so entered into has never been terminated. (Defs. Ex. 1, page 7.)

Plaintiff collected rents for a period of more than thirteen years—from about July 1, 1936, after his mother's death, to "about two years ago", 1950, at $10.00 to $12.50 per month and still has possession of the property and the income therefrom. During this period of time he did very little fixing up. Permitted the house to go to ruin. After suit was filed he told Leola Forsberg that her mother had written him stating she could not care for the property and for him to care for it for her. (Tr. 97-98) He knew his sister owned the property at the time he bought it (Tr. 50) He also knew according to his own witness, Marie Zimmerman, rent was being sent to California when he bought the place. (Tr. 113) although he denied knowing this fact

or anything about the property when he bought it. (Tr. 50) Upon suit being filed Herman Herbrig and the other defendants residing in California learned for the first time that for more than seven years previous plaintiff had claimed to be the owner of the property. (See complaint Tr. 1) On May 26, 1937, plaintiff paid the delinquent 1932 taxes and took a deed from Cache County to himself; on May 27, 1937 he paid taxes for the years 1934 and 1936 for Millie M. Herbrig and on June 14, 1937, he paid the mortgage indebtedness and the mortgagee entered marginal satisfaction. (See pls. Ex. A, pages 15-19). He also paid the sewer assessment. (Pls. Ex. B)

Reference to other facts will be made in the argument in order not to unduly lengthen this brief.

ARGUMENT

POINT NO. 1; The findings of the court are not supported by the evidence and the decree based thereon is therefore manifestly inequitable and wrong from very standpoint of justice and good conscience.

This case was tried before the court without a jury and treated wholly as one in equity. The court will therefore make an independent examination of the entire record, weigh and pass upon conflicting evidence, the logical, reasonable and proper inferences deducible therefrom, the credibility of witnesses, and from the whole thereof determine whether or not in equity and

good conscience the decree rests upon proper and equitable support. In this regard appellant maintains that under well-known rules of equitable review established by the decisions of this court, and even making due allowance and appreciation for the fact that the trial court saw the behavior of the witnesses who testified in the lower court (and there were depositions supplied by both parties), still the evidence does not upon careful scrutiny support the findings, particularly finding No. 4, to the effect that no argument of lease or caring for the property was ever entered into between plaintiff and his brother-in-law, Herman Herbrig, and that a careful weighing, consideration, and interpretation of the facts demands a holding in appellants' favor.

To begin with, many of the facts cannot and were not disputed. Millie M. Herbrig bought the premises from her mother in June, 1917, for $1400.00, and that the premises at the date of the trial were of the value of $2000.00 to $2500.00 minimum. Mr. Herbrig moved to California in late 1922 (just before Xmas) and the following April plaintiff's mother, Annie E. Orison, followed. From the time of his marriage in 1916 to the date of his wife's death in June, 1936, Herbrig supported his mother-in-law in every way except that during her illness after the death of his wife for a while Letha McNeil, a daughter, went to California to assist in the care of her mother. That during all the time the Jufers were tenants Letha McNeil collected the rents and for-

warded same to Millie M. Herbrig until her death; that after her death the Jufer rent money was sent to Herbrig by Letha McNeil until she went to California to assist in the care of her mother and thereafter the Jufers sent the rent direct to Herbrig until the time of the death of Annie E. Orison.

In June, 1936, plaintiff went to California to attend his mother's funeral. Letha McNeil, a daughter, was also there. Certainly it is true that it was not Herbrig's responsibility, legally, to bury his mother-in-law. It would be unnatural, if not almost disrespectful, to think that something would not be said by a son concerning burial expenses and last illness of his own mother. Plaintiff denied that there was anything said. But that something was said is apparent from the testimony of Ila Wickstrom. (Tr. 80, 81). Full details of the conversation were not heard but it is so unlikely and unnatural that a full grown man would not discuss with his brother-in-law who had supported his own mother for about twenty years the matter of funeral expenses that it is contended on such a dispute Herbrig, himself, and his step-daughter, Ila Wickstrom, is to be believed, as against the denial of plaintiff. A further fact which lends credence to Herbrig's testimony as to what was said between them is that Herbrig was hard pressed financially, having had the expenses of illness and burial of his wife a little over a year previous, was two years behind in the payment of taxes and there was the mort-

gage on the premises to be met, that he said he could get "time" to pay funeral expenses, but not these other obligations, whereupon Herbrig testified plaintiff said to him that he, plaintiff, had some money and that he would pay the taxes and mortgage indebtedness if Herbrig would pay the funeral expenses. These, he paid, as is hereafter shown, but not until after he had received considerable rent money. That such an agreement was entered into seems most natural from the facts which followed: Herbrig did pay the funeral expenses and had the receipts covering some of them, amounting to over $200.00 as appears from the exhibits. After the death of his mother-in-law, and after the return to Utah of the plaintiff Herbrig never again received any further rent money according to his own testimony and that of his step-daughter, Ila Wickstrom, who did all his letter-writing and attended to his business for him. It must be remembered, despite anything in the record to the contrary, that Herbrig could not and never did therefore write. Futhermore, it would also appear that plaintiff at least partly performed the agreement claimed to have been entered into for the care of the premises, collecting the rents, etc., because he paid the mortgage indebtedness rather than taking an assignment thereof, and on May 27, 1937, he paid the delinquent taxes for the years 1934 and 1936. (See Pls. Ex. A, sheet 17). They could not have been paid by Millie M. Herbrig because she had been dead for some two years.

It would therefore seem that the first time plaintiff violated this agreement was on May 26, 1937, when he obtained quit claim deed from Cache County to himself upon payment of $38.95 covering delinquent 1932 taxes, and it is upon this deed that he bases his color of title and thereafter his claim of adverse possession. At this time it would seem, inescapably, that a fiduciary relationship existed between plaintiff and Herbrig, that he was under obligation to collect rents and apply them as above indicated, and that he had in fact already collected rents for about a year. The mere asking of a few natural questions dispels plaintiff's testimony to the effect that he had not seen and knew nothing of the property before he bought it at tax sale. He knew his deceased sister was the owner of the property at the time of her death. Why did he not write and tell his brother-in-law and/or some of the other defendants, heirs, that he had purchased the property and intended ultimately to become the owner thereof? He undeniably also knew, his statement to the contrary notwithstanding, that his sister, Letha McNeil, had been collecting the rents and sending them to his sister Millie during her lifetime, and that thereafter they were sent to Herbrig either direct by the Jufers or by Letha until the time she went to California. It is furthermore apparent that he knew a tenant was on the property when he obtained the quitclaim deed from Cache County even though he testified otherwise because his own witness Marie Zimmerman said he told her you need not now

send more rent to California. Even in the face of this flat contradiction of plaintiff's testimony, it is somewhat unnatural and inconceivable that plaintiff would not go around and see the old "homestead" before buying it, and that in visiting with his sister, Letha, he would not have mentioned it to her or she would not have mentioned something about the old "homestead" to him, plus the fact that she had been collecting the rents over the many years. And he did visit with his sister in Logan upon his return to Logan in the fall of 1936, and thereafter. It is therefore submitted that plaintiff's story that he knew nothing about the place before he purchased it, sounds neither natural nor convincing under the circumstances, and that if his testimony is unreliable in matters of this kind he is not entitled to be believed as to the real crux of this lawsuit; Was there or was there not an agreement for the care of the premises entered into as claimed by Herbrig?

Further evidence that plaintiff and Herbrig had an understanding regarding the caring of the property is the fact testified to by Ila Bergstrom, who took care of all of her step-father's mail and attended to his business for him, not denied by plaintiff, that after plaintiff left California they received no further tax notices nor did they hear anything further from the mortgagee, Erickson. The plaintiff must have paid the taxes for the year 1936 for there is nothing in the record to show that they became delinquent and certainly none of the

defendants paid these taxes, and such payment therefore on the part of plaintiff must have been done in accordance with an agreement claimed to have been entered into by Herbrig; also the mortgage was not paid until June 14, 1937, and the interest thereunder was payable semi-annually so that plaintiff also must have paid the interest at least once since the time he left California. Other evidence indicating plaintiff had conversed with Herbrig regarding the property while he was in California is the fact that in his complaint filed herein he states in paragraph two that Millie M. Herbrig, his sister, left no creditors or outstanding debts of any kind, except the indebtedness against the property, and that there were no outstanding debts of any kind against her estate. If Herbrig had not told him, then how would plaintiff be appraised of these facts. If Herbrig and the children had not intended to save the Logan property, would they not have probated and sold it years ago? Is not the agreement claimed by plaintiff the natural result of dealings with his brother-in-law, no doubt the only relative to whom he could then believe he could depend upon to look after and protect the property? But just why plaintiff should state in the complaint that there may be other unknown heirs and persons claiming some right, etc., in the property is beyond comprehension because he testified at the trial that his sister left no deceased children and that he knew all of her children. Also, just why did plaintiff indulge in the duplicity of writing for names and addresses for "genealog-

ical purposes" when he wanted it for the purpose of filing suit? Why did he not plainly tell his brother-in-law and nephews and nieces the real reason for wanting this information? If he was claiming the property adversely, he therefore knew that the only persons interested therein was the heirs of his deceased sister, Millie, consisting of his brother-in-law, and his nephews and nieces, all of whom resided in California and to none of whom he ever advised of his intentions, except that in 1942 he told Leola. It is submitted that as to the matters above mentioned plaintiff's testimony that no agreement was either mentioned nor entered into is not convincing, and that Herbrig's testimony, supported as it is by other testimony and the facts and circumstances, is convincing and persuave that the agreement as claimed by him was actually entered into.

So much then for the question as to whether or not an agreement was entered into. But as to the other important element of this law suit, which it is submitted should have an important bearing upon the question previously discussed in this brief, THE EQUITABLE FEATURE, it is contended the plaintiff has no standing at all. Certainly he has no claim either against the property or the Millie M. Herbrig Estate (even if no agreement had been entered into for the collection of rents, etc.) or against any of the heirs, either legally or morally, because it must be remembered that he collected rents for a period of at least thirteen years at from

$10.00 to $12.50 pr month, which would amount reasonably (striking a medium of $11.25 per month) to the sum of $1755.00, that he did little fixing-up about the premises and that he only paid altogether for the property, giving him credit for everything possibly appearing in the record, $620.64. (Taxes $38.95, and $58.10; mortgage including one year's interest, $162.00, and sewer $361.99.) He, therefore expended less for the property than the $1400.00 deceased paid for it in 1937. It is common knowledge that all real estate has since then increased in value and there is at least some evidence that this property is now worth at least $2000.00 to $2500.00 Plaintiff would therefore, if he recovered nothing be more than amply paid for his services because he did very little, let the property go to ruin, and he had no trouble with tenants because the whole of the time he only had two, the Jufers and his son. From a dollar and cents standpoint plaintiff profits exceedingly well, all things considered. He should not therefore in addition be permitted to probate his deceased's sister's estate via the route of a quiet title action, and upon such a contradictory and wholly unconvincing record acquire the property and thus deprive those who paid the expenses of last illness and funeral expenses from even recovering these items. This would result in plain and palpable inequity. It is submitted that plaintiff's testimony sparkles with contradictions, unreasonableness and lack of conviction, and that his testimony is no stronger than what remains of it, after cross-

examination, and after the reasonable deductions therefrom, reasonably made in the face of all the surrounding facts and circumstances, and that viewed in this respect judgment should be for defendants that plaintiff recover nothing and that defendants recover the property and also their costs expended herein.

Furthermore, while it is believed that this cause is primarily a question of whether or not the record supports the judgment of the lower court, nevertheless it is believed that the following rules should also have influence in determining the facts. That there is nothing in the law, either general or statutory, requiring such an agreement as contended for by defendants to be in writing. The question therefore, is: Was the agreement as contended for by the defendant, Herbrig, entered into with plaintiff. A rather intensive search has failed to yield a case exactly like the case at bar as to the facts, altho the law seems to be well settled. In this case, if the court finds such an agreement was entered into the question of termination cannot arise because plaintiff denied the existance of an agreement in toto. The defendant is then correct, and the contract was never terminated, and so it is still in effect because the purpose has not yet been accomplished. 2 C. J. Agency, Sec. 147 and Sec. 55. Furthermore, an agent is under obligation as a fiduciary to exercise good faith of the highest order. He cannot acquire an interest adverse or in antagonism to his trust. 2 Am. Jur. Agency Sec. 252. One who is under

duty to pay taxes cannot add or strengthen his title by purchasing land at tax sale. 85 Pac. 2d, 107, Albergo vs. Gigliotti (Utah) and cases therein cited. 2 C. J. Agency Secs. 366, 261. Our court has even held, 55 Pac. 549, Argentine Min. Co. vs. Benedict, (Utah) that an attempt of an agent employed to do the annual assessment work on a mining claim, after failure to do the work, to relocate the claim, is a fraud on his principal. Nor will subterfuge be tolerated. Victor Gold and Silver Min. Co. vs. National Bank of the Republic, 49 Pac. 826, (Utah). It would, therefore appear from the above that the law is well settled that if there was an agreement entered into and defendants insist there was that the plaintiff cannot possibly profit thereby by acquiring title via the route of paying delinquent taxes and even by following this by a quiet title action.

CONCLUSION

It is therefore submitted that not only the equities are entirely in defendants' favor, and that defendants' evidence also preponderates in favor of the existance of an agreement, but that the plaintiff's testimony upon careful scrutiny also discloses the making of an agreement, and that for these reasons in justice and equity the holding of the lower court should be reversed and a finding made in defendants' favor to the effect that the plaintiff violated the terms of agreement made with Herbrig and that he holds said property in trust for

the Heirs of Millie M. Herbrig, deceased, and for defendants' costs.

Respectfully submitted,

Attorney for Defendants and Appellants.